

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Commission's Rules Regarding	)	
the Pricing of Unbundled Network Elements	)	WC Docket No. 03-173
and the Resale of Service by Incumbent Local	)	
Exchange Carriers	)	

**COMMENTS OF UNITED COMMUNICATIONS SYSTEMS, INC.**

United Communications Systems, Inc. (d/b/a "Call One") ("UCS") is a competitive local exchange carrier ("CLEC") based in Illinois. Founded by an antitrust attorney, UCS was one of the first carriers to provide smaller Illinois business customers with a competitive alternative for local service following the passage of the Telecommunications Act of 1996 (as amended to date, the "Act"). UCS's customers are located primarily throughout the Midwest and include not only small to medium sized businesses and firms, but also many healthcare facilities, municipalities and schools. As a reseller of SBC service, UCS provides competitive pricing and a level of service and focused attention to its customers that would not be available absent competition.

UCS is likely unique to this rulemaking, as it is probably the smallest commenting CLEC and one of the few, if not the only, CLECs submitting comments whose business is solely focused on the resale of telecommunications services to business customers. As perhaps "the last man standing" to offer SBC resale service, UCS feels it necessary to comment because the rules that result from this docket, and the various state commissions' interpretation and implementation of those rules, will determine the future viability of resale as a market strategy.

**I. ICB CONTRACTS ARE UNDERMINING THE PURPOSE OF THE SECTION 251(c)(4) WHOLESALE DISCOUNT.**

As the Commission explained in 1996, the Act contemplates three paths of entry into the local market – construction of new networks, use of unbundled elements of the incumbent's network, and resale – with some new entrants using more than one of these paths of entry as market conditions and access to capital permit.<sup>1</sup> The Commission also recognized that resale is an important entry strategy in the long term for many small businesses that cannot afford to compete in the local exchange market by purchasing UNEs or building out their own networks.<sup>2</sup>

The Commission has recognized the importance of extending wholesale discounts to promotional and discounted offerings, including contract and customer specific offerings, lest “incumbent LECs . . . avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.”<sup>3</sup> In some states, however, incumbent LECs refuse to make Individual Case Basis contracts (“ICBs”)<sup>4</sup> available at wholesale rates, while in other states, they offer such ICBs only at a wholesale discount that is greatly reduced from the wholesale discount for standard tariffed services.

This makes it possible for incumbent LEC to use ICBs as a pretext for restricting reseller access to certain new telecommunications services and end user markets. The incumbent LEC offers "Generic ICBs" that are not based on the end user's unique circumstances (e.g., geographic

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<sup>1</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd 15499 para. 12 (1996)(“*Local Competition Order*”).

<sup>2</sup> *Id.* para. 32.

<sup>3</sup> *Id.* para. 948.

<sup>4</sup> In some states, ICBs are referred to as “CSAs,” or “Custom Service Arrangements. There may be other names as well. In using the term “ICBs” herein, UCS intends to refer to any contract arrangement that the incumbent LEC may have with a customer that provides service under rates, terms and conditions that differ in any way from its published tariffs.

location, network architecture, uniquely volume that significantly exceeds standard tariff offerings, etc.) that justify the offering of individualized off-tariff prices and terms.<sup>5</sup> Rather, Generic ICBs extend more advantageous rates, terms and/or conditions<sup>6</sup> to end users that otherwise fit within the requirements of the incumbent LEC's standard tariff offerings. This is a particular concern when a Generic ICB is to be sold to new customers, rather than the CLEC merely assuming the ICB to serve the original customer. If a Generic ICB is sold to a new customer, virtually all costs that are avoided when a tariffed service is resold are avoided.

In states that permit only a small ICB discount (or none at all), incumbent LECs are free to engage in predatory misuse of the ICB process, in that they are able to restrict competition by progressively migrating end users to Generic ICBs which, because of their minuscule (or zero) discounts, are out of the reach of resellers. Generic ICBs thus create a huge loophole, the progressive use of which will permit incumbent LECs to shift their customers to nonstandard offerings and gut resale as a viable business.

The primary effect of the Generic ICB loophole is to subject resellers to a price squeeze. Generic ICBs rarely differ significantly from standard tariff offerings but can still result in a more compelling offer to the end user. If the Generic ICB, merely by virtue of being called an "ICB," is subject to a greatly reduced wholesale discount, a CLEC reseller will always be caught

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<sup>5</sup> For example, an Ameritech witness testified in a proceeding before the Michigan PSC that "ICB contracts are basically discounts off the published tariffed rates. The service is the same as the tariffed service and carries the same terms and conditions." Matter to Consider the Total Service Long Run Incremental Costs for All Access, Toll, and Local Exchange Services Provided by Ameritech Michigan, Mich. P.S.C. Docket No. U-11831, Affidavit of Eva L. Stork ¶ 21 (filed Jan. 21, 1999).

<sup>6</sup> The modification to the tariff offering that gives rise to the Generic ICB may be a minor variation to the tariff offering (e.g., different billing increments (partial minute v. full minute) or inclusion of a "rate stability" clause) or a more significant variation (e.g., providing a lower rate on a given element or applying a discount to additional services).

in price squeeze; the standard offering is less competitive than the ICB and the CLEC cannot match the price that the incumbent LEC is charging without losing money.

## **II. INCONSISTENT TREATMENT OF THE ICB RESALE ISSUE BY STATES HAS RESULTED IN A PATCHWORK IMPLEMENTATION OF SECTION 251(c)(4).**

State Commissions have reached different conclusions on the discount applicable to ICBs resold to third parties. Many states have ruled that ICBs are subject to the same, or nearly the same, wholesale discount as tariffed services.<sup>7</sup> Unfortunately, others have bowed to the demands of the incumbent LEC and greatly reduced the wholesale discount. Of the remaining states, some have established middle grounds between the two extremes, while others have not squarely addressed the issue (sometimes leaving it for unilateral determination by the incumbent LEC).

There are a number of key reasons supporting standard wholesale discounts for ICB contracts, particularly Generic ICBs. First and foremost is the (now well-founded) fear of the Commission and state commissions that incumbent LECs would otherwise use ICBs to avoid their resale obligations altogether. The Commission originally expressed this concern in the *Local Competition Order* when it declared that customer specific offerings (e.g., ICBs) were subject to resale: “A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.”<sup>8</sup> Or, as the Alabama Public Service Commission stated:

We are fearful that allowing an incumbent LEC to completely avoid its resale obligations for CSAs would allow such LECs to use CSAs in an anti-competitive manner. If LECs are not required to resell CSAs at the wholesale rate, LECs will be in a position to underprice their competitors by simply offering a CSA with a lower price. Under such a scenario, the LECs would have anti-competitive

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<sup>7</sup> E.g., Alabama, Florida, Georgia, Maryland, Missouri, New York, North Carolina, Pennsylvania, Vermont and West Virginia.

<sup>8</sup> *Local Competition Order* para. 948.

incentive to migrate all their large customers to CSAs in clear contravention of the Act and its underlying purposes.<sup>9</sup>

As the Alabama Public Service Commission recognized, if ICBs can be purchased by resellers only at a substantially diminished resale discount, ICBs would become a loophole for incumbent LECs to avoid resale entirely, at least with respect to large customers.

Apart from the important policy considerations set forth above, ICBs also must be resold at a wholesale discount because federal law does not provide an ICB exception to the obligations of Section 251(c)(4).<sup>10</sup> Exempting ICB contracts from receiving wholesale discounts is also unreasonable and discriminatory, in violation of § 201 of the Act.<sup>11</sup>

### **III. ICB CONTRACTS SHOULD BE AVAILABLE FOR INSPECTION.**

It is critical that the Commission issue rules requiring that the incumbent LEC actually make copies of the ICBs available for inspection by CLECs.<sup>12</sup> Otherwise, no matter how great

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<sup>9</sup> Arbitration Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., Al. P.S.C. Docket No. 25703, Joint Order on Reconsideration § III(B)(1)(c)(May 14, 1997)(“Alabama Arbitration”).

<sup>10</sup> In the *Local Competition Order*, the Commission found that:

Section 251(c)(4) provides that incumbent LECs must offer for resale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional discount service offerings made by incumbent LECs.

*Local Competition Order* para. 948. See *Alabama Arbitration* § III(B)(1)(c)(“The 1996 Act indeed mandates at 47 U.S.C. § 251 (c)(4)(A) that incumbent LECs ‘offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunication's carriers.’ That Section of the Act provides no exceptions and it would be a clear violation of the Act to allow any incumbent LEC to withhold retail services such as CSAs from its resale obligation either by refusing to resell such services, or by refusing to resell such services at the wholesale discount. Such a conclusion is also consistent with the FCC's interpretation of the Act as set forth in its Order at ¶¶ 948-951.”)

<sup>11</sup> “Incumbent LECs are prohibited from placing unreasonable or discriminatory conditions or limitations on the resale of telecommunications.” Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996, Md. P.S.C. Case No. 8731, Order No. 73010 at 43 (1996).

<sup>12</sup> The Commission’s rules should properly address the redaction and protection of any customer identifying information that may be identified in disclosed ICBs.

the discount, the CLEC will be unable to resell the ICB, because it will not know that the ICB exists or what it provides.<sup>13</sup> For example, in Illinois, SBC has not, despite repeated requests by UCS, provided any process for a reseller to obtain notice of and access to the terms of ICBs and actually order an ICB from SBC for resale to a new end user in Illinois. SBC's failure to provide resellers with a process for ordering ICBs has the effect of a general exemption from the resale requirement for all ICBs, which violates Section 251(c)(4) of the Act.<sup>14</sup>

#### **IV. FOR THE SAKE OF ALL TYPES OF LOCAL COMPETITION, THE COMMISSION MUST ACT TO PRESERVE ITS ORIGINAL INTENT AND ENFORCE A CONSISTENT IMPLEMENTATION OF SECTION 251(c)(4).**

There will be significant effects on all competition, including facilities based competition, if incumbent LECs are permitted to offer Generic ICBs without making them

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<sup>13</sup> “[I]f Verizon is excused from compliance with Rule 39, competitors will have no idea that an ICB exists, much less whether prospective customers are similarly situated and whether pricing terms are competitive.” Bell Atlantic Tariff Filing, WV P.S.C. Case No. 00-0650-T-T, Order (Jan. 3, 2001). “In relaxing our requirements in regard to BellSouth’s CSAs . . . it appeared at that time that, given the competitive conditions of the marketplace, detailed review of each CSA was no longer necessary. However, our action in that docket may well have disadvantaged telecommunications customers and CLECs who no longer are able to review the full CSAs.” Inquiry into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky, Ky. P.S.C. Case No. 2002-0456, Order at 3 (Dec. 19, 2002).

<sup>14</sup> SBC maintains that section 13-509 of the Illinois Public Utilities Act provides a viable process for resellers to obtain access to and notice of the terms of ICBs for determining whether they want to resell an ICB in Illinois. SBC’s position is flawed for several reasons. First, SBC’s position disregards the fact that section 13-509 was not intended by the Illinois Commerce Commission (“ICC”) to set forth a process for CLECs to access and resell ICBs and does not expressly provide CLECs with a right to review ICBs or any ordering procedures. In addition, even if section 13-509 did provide UCS an express right to request access to the ICBs SBC has on file with the ICC, at SBC’s request, the ICC accords proprietary treatment to any ICBs that are submitted. Thus, even if the ICC interpreted section 13-509 to allow CLECs to review SBC’s ICBs, it is unable to provide CLECs access to those ICBs that SBC has requested proprietary treatment. Further, SBC requires end user customers to treat their ICB contracts as the proprietary information of SBC, and refuses to permit end users to show their ICB contracts to CLECs in Illinois. Thus, resellers in Illinois are effectively prohibited from obtaining access to ICBs from any source including SBC, the ICC or the end user. SBC’s failure to provide access to ICBs and a process for ordering ICBs has the effect of a general exemption from the resale requirement for all ICBs. Such an exemption constitutes an unreasonable restriction on resale and violates section 251(c) of the Act and FCC rules. *See Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd. 539 paras. 217-18 (1997); 47 C.F.R. § 51.605(a); 47 C.F.R. § 51.605(e) (“Except as provided in § 51.613, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.”)

available for resale at an avoided cost discount comparable to the prevailing avoided cost discount for tariffed services. Contrary to early fears that resale competition would make it impossible for otherwise viable facilities-based competition to take root, resale competition has actually protected all forms of competition. This is because Section 252(d)(3) acts as a safeguard against predatory pricing by incumbent LECs by dynamically lowering the floor at which resale competitors can offer comparable services. For example, no matter how far below cost an incumbent LEC might price a retail service (assuming below cost pricing is permitted by the state commission), the incumbent LEC is still required to offer that service at wholesale discounts under 251(c)(4). This is the only real protection any CLEC -- reseller or facilities-based -- has against an incumbent LEC slashing retail prices below cost. If, however, an incumbent LEC is able to exploit the loophole described above, providing services via ICB that are subject to a discount so low that it effectively precludes the resale of such services, that protection is lost.

Resale has a valid place in facilitating a competitive market. It squeezes out inefficiencies in those aspects of the incumbent LEC's operation as to which the reseller provides its own inputs (e.g. sales and marketing, customer service, and billing and collection). It is also the only form of competition for geographic areas and customer segments where facilities-based competition is not feasible.<sup>15</sup> With the Commission beginning, as a result of the *Triennial Review Order*,<sup>16</sup> to phase out UNE-P in many areas and for many types of services, resale is the only entry strategy through which a new entrant can assemble a customer base before investing

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<sup>15</sup> "Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC's service territory, while using resold services to reach customers in less densely populated areas." *Local Competition Order* para. 12.

<sup>16</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003).

in its own facilities. Moreover, incumbent LECs should favor resale competition because it enables customers who wish to switch to another carrier to continue using (rather than potentially stranding) the incumbent LEC's facilities and allows the incumbent LEC to be continued to be paid for the use of its facilities.

Nearly eight years after the Act was enacted, some incumbent LECs continue to disregard their obligation under the Act to make ICBs available to CLECs for resale to new customers at the required wholesale discount rate. The Act expressly requires incumbent LECs to “offer for resale at wholesale rates *any* telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”<sup>17</sup> The Act makes no exception to this general principle for ICBs or other promotional offers.<sup>18</sup> Disregarding these long-standing requirements, some incumbent LECs (SBC in particular) continue to refuse to permit CLECs to resell ICBs to new customers at a wholesale discount rate that conforms to Section 252(d) of the Act.

State commissions are required to establish wholesale discount rates for all retail telecommunications services, including ICBs, pursuant to the avoided cost methodology of Section 252(d) of the Act and Commission rules 51.605, 51.607, 51.609 and 51.611, including the resale of ICBs to new end users.<sup>19</sup> To the extent that an incumbent LEC fails to submit a separate avoided cost study to establish a wholesale discount rate for the resale of ICBs to new

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<sup>17</sup> 47 U.S.C. § 252(c)(4)(A) (emphasis added).

<sup>18</sup> *Local Competition Order* paras. 948. (Section 251(c)(4) “makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings.”)

<sup>19</sup> 47 U.S.C. § 252(d); 47 C.F.R. §§ 51.605, 51.607, 51.609 and 51.611.



end users,<sup>20</sup> UCS suggests that a discount rate equal to the standard established rate for tariffed services is appropriate, particularly for Generic ICBs. This is reasonable in light of the fact that the FCC has established a “default” range of 17% to 25% for the wholesale discount rate that would apply until such time as a state commission has an opportunity to review a fully-compliant avoided cost study to establish a final rate.<sup>21</sup> The Commission should adopt UCS’ position and establish a nationwide presumption that discounts for ICBs to new customers shall be equivalent to the standard avoided cost discount, subject to rebuttal by appropriate cost studies or expansion by state commissions.

Respectfully submitted,

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<sup>20</sup> For example, SBC has not even submitted an avoided cost study to establish the applicable rate of ICBs in Illinois.

<sup>21</sup> *Local Competition Order* paras. 908, 910, 932-33; 47 C.F.R. § 51.611 (“The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25 percent, below the incumbent LEC’s existing retail rates . . . [and the] same discount percentage rate shall be used to establish interim wholesale rates for *each* telecommunications service.”)(emphasis added).